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Adoption from care in Germany: inconclusive policy and poorly coordinated practice

Thomas Meysen and Ina Bovenschen

Introduction

As in most other countries, the principle of the child's best interests is the legal foundation for all adoption decisions. In Germany, apart from step-parent adoptions, which account for around 60 per cent of all adoptions (Federal Statistical Office, 2019), adoption mainly represents a legal option for children whose birth mothers have decided – mostly before giving birth – that they cannot care for their children. Hence, in the majority of cases, birth parents relinquish their children for adoption immediately after birth, often because of their highly burdened life circumstances. Most of the children placed with parental agreement move to an adoptive home within the first days, weeks or months of life. In contrast, only a small number of children are adopted from out-of-home care (foster or residential care). Adoptions (from care) without parental consent are even rarer due to legal restrictions on non-consensual termination of parental rights. Although adoptions from care are rare in Germany, and adoption is not primarily viewed as a permanency option that must be considered for children in care who cannot return home, this chapter aims to shed light on the current status of adoption from care in Germany.

Legal framework of adoption and organisations involved in adoption

The legal framework

Although adoption services are embedded in the child and youth welfare system, they have a separate place in family law and in child

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protection as well as child and youth welfare law, resulting in the legal framework for adoptions in Germany presenting an inconclusive picture. First, the roots of adoption as a legal option to found a family in Roman law are still present. Regulations within family law are to be found within an entirely separate chapter of the Civil Code (CC) as well as of the Act on Proceedings in Family Matters. Responsibility for the civil law provisions on adoption lies with a division of the Federal Ministry of Justice and Consumer Protection, alongside the law on guardianship for minors and legal custodianship for adults (Federal Ministry of Justice and Consumer Protection, 2019). This makes for a distinction from other family law matters, such as child protection, parental custody, access and family relations.

Second, in terms of service provision and assessment, adoption services have their core legal base in a '*special part*' of the Social Code – the Adoption Placement Act – which, on the one hand, embeds them in the child and youth welfare system and, on the other, provides for a special status. Responsibilities for policy and legislation referring to the Adoption Placement Act lie within the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2020).

Although adoption is regulated by federal law, its legal bases are scattered and complex. The provisions for domestic adoptions are as follows:

- legal requirements and legal effects of adoption are in the German CC (ss 1741–1772);
- court proceedings are in the Act on Proceedings in Family Matters (ss 186–199);
- adoption services are in the Adoption Placement Act, as well as the Act on the Prevention and Coping of Pregnancy Conflicts; and
- adoption as a permanency option for children in out-of-home-care (as well as the required counselling and '*cautioning*' before finalising adoption without parental consent) are part of the Social Code Book VIII on child and youth welfare (ss 36[1] or 51).

Concerning placements in out-of-home care (both foster care and residential care), German law mainly differentiates according to the systems it addresses. A withdrawal of parental rights to enable a placement is within the sole responsibility of the family courts and therefore regulated in the CC (ss 1666, 1666a). The placement itself is regulated in the Social Code regulating the child and youth welfare system.

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Organisations involved in adoption services

Federalism plays out strongly in the field of adoption services as the federal constitution guarantees communities a right to self-government within the legal framework. In contrast to the low number of adoptions in Germany (for details, see later), there are many adoption agencies, the large majority being part of the youth welfare offices (*Jugendamt*) in the cities and counties. However, due to a constitutionally guaranteed tradition of the principle of subsidiarity (Daly, 2000), in some regions, (Christian) non-governmental organisations (NGOs) provide adoption services instead of the youth welfare offices.[1] All NGOs are supervised and monitored by regional youth welfare offices at the state level (*Landesjugendämter*). Regional youth welfare offices are required to cooperate with adoption agencies in their region and to be involved in cases of hard-to-place children (that is, children with special needs). As with in-care placements, placements for adoption fall within the responsibility of the child and youth welfare services; therefore, the organisational structures vary between states (*Länder*) and even between municipalities within a state. Usually, three different units are involved in domestic adoptions:

- Adoption agencies, which are responsible for: assessment and training of (prospective) adoptive parents; preparing and supporting birth parents who are considering placing their children for adoption; matching between a child and prospective adoptive parents; and providing post-adoption support.
- General social services, which work with the families of origin prior to and during out-of-home care and are responsible for assessing the children's needs, deciding on the provision of support services and child protection. With respect to adoption, they are only involved in adoptions from care.
- Foster care services, which are responsible for assessment and preparation of potential foster parents, as well as supervision and support of the foster family. They too are only involved in adoptions that are from care.

Although the assignment of tasks and the extent of integration between the units vary, adoption agencies and foster care services are sometimes combined in one unit. This can be traced back to the critique of institutional care during the 1968 movement that led to a systematic placement of younger children in foster care (Ristau-Grzebelko, 2011;

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Berth, 2019). Further, the fundamental reform in 1976 introduced a probationary period, called 'adoption care' (*Adoptionspflege*), and also created a lingual closeness to 'foster care' (*Vollzeitpflege*). Until today, child protection matters remain in the separate units of adoption and foster care services (Helming, 2011). Cooperation between the different services or units varies extremely and coordination struggles because after placing a child in out-of-home care, the general social services continue working with the family of origin whereas the foster care services work with the foster family. Adoption services are often not involved at all when children are placed in foster care or residential care.

Section 3 of the Adoption Placement Act explicitly addresses securing quality and professionalism in adoption services. An adoption agency has to be staffed by at least two full-time equivalents; part-time workers are not allowed to predominantly have other tasks. However, this regulation is frequently circumvented as only 57 per cent of adoption agencies are staffed accordingly (Bovenschen et al, 2017b). There are requirements with respect to case workers including at least one year's experience in the field of adoption or foster care (Reinhardt et al, 2019). In practice, 91 per cent are social workers, the others are mainly *pedagogue*s; they have an average of 12.5 years of professional experience (Bovenschen et al, 2017b). In sum, the legal/organisational positioning of adoptions can be characterised as having an insular existence, with a mixture of federal policy influence and different systemic cultures of practice.

Main principles and ethos of adoption

Adoption legislation and practice

Section 1741 of the German CC requires that 'the adoption of a minor child shall be granted if it serves the child's best interests, and if a parent–child-relationship is to be expected'. Both the child and the legal parents have to consent; from the age of 14, the child has to give consent themselves (ss 1746, 1747 CC). Adoption terminates all parental rights and legal family relationships to the family of origin (s 1755 CC) (exceptions are made for adoptions by relatives). At the same time, adoptive parents gain the legal position of parents in every respect (s 1754 CC). The legal concept starts from the premise that not only all legal ties, but also all actual ties, to the family of origin are ended. Called '*incognito adoption*', German adoption law forbids the disclosure of an adoptive family's name or address (ss 1747 [2]2, 1758 CC; see also Helms and Botthof, 2017).

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Legislators' reasoning in the 1970s was that 'it is essential for the child's unimpaired development that the old family which has not been able to take on the up-bringing of the child does not disturb the adoptive family' (Deutscher Bundestag, 1975: 9, 46). This initial conceptualisation is deeply rooted in a practice of confidentiality as professional ethos, usually leading to working with the birth family and adoptive family separately (Bovenschen et al, 2017b).

In contrast to the legislation, adoption practice has changed during recent decades, and an increasing number of adoptions are now 'semi-open/mediated' or 'open/fully disclosed'. The form of contact in open adoptions is manifold and may include phone calls, visiting with each other and sharing photos and letters (Bovenschen et al, 2017a). However, as confidential adoption remains the legal norm, neither birth parents nor other members of the family of origin have a right to contact or a right to receive information about the child after consenting to adoption (s 1751 CC). Despite this, some adoptive families[2] do decide upon contact with birth family and/or exchange of information at their own discretion. However, contact after adoption remains fairly unusual in Germany. A recent study found that in 36 per cent of the cases, the child had personal contact with members of the family of origin at least once. In another 38 per cent, there was information shared at least once, mostly letters via adoption agencies. Regular contact or information exchange took place at a lower rate with around 25 per cent. The majority of this subgroup are children adopted from care (Bovenschen et al, 2017b).

Confidential birth

In 2014, 'confidential birth' was legally established by the Act for the Expansion of Support for Pregnancy and to Regulate the Confidential Birth. The legal framework offers an opportunity for a pregnant woman to get the medical help she needs and give birth in a hospital or with a midwife without having to reveal her identity. The baby is usually placed into state care and freed for adoption. In consideration of the child's right to know their own birth identity, the pregnancy counselling centres are obliged to provide the adoption agencies with messages and items the mother leaves in trust for the child (s 26). When the child turns 16, they are given access to the birth mother's personal details and can contact her unless the birth mother has objected to disclosing her personal data.

The Act aimed to reduce the numbers of children placed in baby hatches and other forms of anonymous births, and to secure

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information for the children in accordance to their constitutional right to know their own heritage (Art 2[1] Basic Law). However, as a study evaluating the law reported, numbers for the different forms of anonymous births are still high (Sommer et al, 2017), and the Act has been critically discussed.

Parental consent/substitution of parental consent

An adoption requires parental consent, and there is no option to terminate parental rights after a fixed time in care. The family court can decide on a 'substitution' of parental consent but courts are reluctant to grant an application for adoption without parents' consent. In reaction, youth welfare offices rarely advocate substitutions of parental consent. In 2018, there were 225 cases (including step-parent and kinship adoptions) with a substitution of parental consent in Germany (Federal Statistical Office, 2019). The requirements for substitution of parental consent to adoption (s 1748 CC) set a high threshold:

- a particularly serious and persistent violation of parental duties or parental indifference, and a disproportionate disadvantage for the child if the adoption does not take place;
- a serious but not persistent violation of parental duties with the consequence that the child probably cannot return to the parent;
- a permanent incapability of caring for and bringing up the child as the result of a serious mental illness or disability of the parent(s), along with serious harm to the child because they could not grow up in a family without an adoption; and
- the mother and father not being married with the mother having sole custody, a father who does not give consent and a disproportionate disadvantage for the child if the father's consent is not substituted.

Legislation interprets 'serious violation of parental duties' as meaning that parents do not meet the basic physical or psychological needs of the child. In addition to the violation, a balancing is required. If 'disproportionate disadvantage for the child' can be assumed, adoption is preferable 'because adoption provides for a better basis for the integration of the child in a new family' (Federal Constitutional Court, 2002).

Substance or alcohol addiction is not a violation in itself, only if it influences the child's health negatively (Wapler and Frey, 2017). Likewise, the threshold is not met if a parent agrees to placement in a foster family and does not keep (regular) contact (Federal Constitutional

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Court, 1987). 'Parental indifference' cannot be assumed in case of ambiguous behaviour since no contact can be an act of deference to the child; therefore, it mostly relies on the statements and expressed interests in the court proceedings (Federal Constitutional Court, 2002). A 'permanent incapability to care' does not allow for an adoption against the parents' will if the child can grow up in a family (including a foster family) without adoption (Federal Supreme Court, 1996).

An expert review published by the German Research Centre on Adoption (EFZA) recommended integration of the section on substitution of parental consent to an adoption as the most intrusive child protection measure within the provisions on withdrawal of parental rights in child protection cases (Wapler and Frey, 2017). This would clearly place adoptions from care in the child protection context, in which it is, to date, scarcely visible. To date, no legislative changes are anticipated.

Adoption from care: the role in child welfare policies

The German CC does not recognise adoption from care as a distinctive category, and German legislation does not pursue a permanent family life situation (in an adoptive home) against parents' wishes. However, the Social Code Book VIII includes an obligation for permanency planning if a sustainable enhancement of parenting in the family of origin cannot be achieved in a time frame that takes the child's development into account (s 37 [2]). General social services in the youth welfare offices are required to assess whether adoption is an option before and during a long-term placement (s 36 [1]2 Social Code Book VIII). However, results show that adoption agencies and general social services mainly work independently from each other, and that adoption agencies are rarely involved in the support and care planning process (Hoffmann, 2011; Bovenschen et al, 2017b).

Statistics on child protection and adoption

Table 8.1 shows that the number of children and youth in out-of-home care (both foster care and residential care) increased steadily during recent years. Specifically, due to the refugee influx in Europe beginning in 2015, the number of children and youth in care (especially children and youth in residential care) increased sharply from 2015 to 2016. In December 2016, 69,401 children and youth below the age of 18 lived in foster care and 77,857 in residential care or other forms of assisted living (a total of 147,258 children and youth aged 0–17 and a rate of

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Table 8.1: Children (< 18 years of age) in foster care/residential care and placed for adoption from care

Year	Children in care at year end		Total in care (rate per 100,000 children)	Total placed for adoption care from care (rate per 100,000 children)
	Foster care	Residential care		
2016	69,401	77,857	147,258 (1,082)	269 (2.0)
2015	67,122	68,109	135,231 (1,003)	250 (1.9)
2010	56,726	53,744	110,470 (812)	326 (2.4)
2005	47,517	51,855	99,372 (356)	373 (2.6)

Source: Federal Statistical Office (2011a, 2011b, 2017a, 2017b, 2018a, 2018b). All data referring to 2005 were generated based on statistics provided by the Federal Statistical Office on request.

1,082 per 100,000 children under 18). In international comparison, the number of children and youth in care in Germany has historically been rather high (Thoburn, 2008). In terms of the legal basis of out-of-home care, data show that the majority of children and youth are in voluntary care (56.1 per cent of those in foster care and 73.1 per cent of those in residential care in 2016), and parental rights remain (partially) with the biological parents.

Foster families mainly provide long-term placements, resulting in an average residence time that is, in international comparison, one of the highest (Thoburn, 2008; Küfner et al, 2011). In 2016, children and youth under the age of 18 had lived an average of 29 months in a foster home at the time of leaving care or changing in-care placement. Further results show that 65 per cent of foster care placements were declared as permanent during the first year. After a duration of between one and two years, the rate was at 85 per cent, between two and three years, it was at 88 per cent, and after that, it was at 98 per cent (Kindler, 2011a). Data on residential care reveal that, in 2016, children and youth stayed an average of 17 months before leaving care or changing placement. Referring to residential care, adoptions are highly exceptional, and existing cases may be largely explained by the fact that, in some regions, due to the lack of foster families, children who are intended to be in foster care have to be placed in residential care instead. The majority of children moving from foster care to adoption care (a probationary period during which the child is living with prospective adopters before the adoption may be finalised) are younger than six years of age (ranging between 66 per cent and 78 per cent of all children moving from foster care to adoptive homes in 2005 and 2016).

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Table 8.2: Adopted children and youth (< 18 years of age)

Year	Non-kinship adoptions (domestic and inter-country)[a]	Adoptions from foster care[b]	Adoptions from residential care[b]
2018	1,330	421	124
2015	1,362	437	218
2010	1,669	461	385
2005	1,861	537	431

Note: [a] Excluding step-parent and kinship adoptions. [b] Including both domestic and inter-country adoptions. Data include adoptions from foster care and adoptions from residential care but exclude adoptions of children who lived with relatives prior to adoption. Thus, the data presented here differ from those provided in Burns et al (2019).

Source: Data were generated from annual statistics published by the Federal Statistical Office (Federal Statistical Office 2006, 2011c, 2016, 2019).

Federal adoption statistics show that the total number of adoptions in Germany, both domestic and inter-country adoptions, is low compared to the rather high number of children in out-of-home care (see Table 8.2). The number of adoptions (including domestic and inter-country adoptions but excluding step-parent and kinship adoptions) has declined from 1,861 adoptions in 2005 to 1,330 adoptions in 2018 (Federal Statistical Office, 2019) (see Table 8.2).[3] The Federal Statistical Office also publishes information on the number of children moving to adoptive homes from foster care or residential care (see Table 8.2).

Reasons for low numbers of adoption from care

To date, there are no empirical studies investigating the reasons for low numbers of adoptions from care in Germany. However, experts in the field discuss the following reasons:

- Parental consent: most birth parents would not consent as they see themselves as parents and want to maintain a role as caring parents. The threshold for an adoption order without parental consent is high.
- Financial support: the costs of care and services are assumed to be major obstacles to foster parents who would otherwise adopt their foster child. There are an increasing number of foster children with special needs. If foster parents take care of a child with special needs, they not only receive the so-called foster care allowance (*Pflegegeld*), but may also apply for additional funding to cover costs for specific care and services. In contrast, there is no subsidised adoption in Germany. Adoptive parents in Germany are not entitled to financial support to help meet the specific needs of their children.

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- Counselling: there is no proactive counselling towards adoption by general social services or foster care services. Since working towards parental consent when placing a child in out-of-home care is of high value in practice (Witte et al, 2019), bringing up the issue of adoption may contradict the efforts. A line is drawn between care placements and adoption, and, as reported earlier, adoption agencies are rarely involved in the care planning according to Section 36 of the Social Code.

Decision-making in adoption proceedings

Prior to the court proceedings, adoption agencies are obliged to counsel all parties (Bovenschen et al, 2017a). The counselling reliably takes place and is usually conducted with all parties (birth parents, potential adoptive parents and child) separately. It gives space for the development of informed consent or for clarification of objections. If the substitution of parental consent is at stake, a formal process is initiated in which the youth welfare office advises the parent(s) about their rights and the legal consequences of an adoption (s 51 Social Code Book VIII).

The process of counselling and assessment can be described as follows (Bovenschen et al, 2017a):

- Birth parents: depending on circumstances, either parents contact the adoption agency or, specifically in case of adoptions from care, the general social services or foster care services bring up the issue. Information is given, and the parents are counselled in a strictly confidential setting. If the parents decide for an adoption of their child, they have to sign their formally witnessed consent to the adoption; such a consent cannot be given before the child is eight weeks old (s 1747 [2]1 CC). After authentication, parental responsibility is suspended, including the obligation to pay child support; personal contact may not be continued (s 1751 CC). However, they sustain a right to receive support by the adoption agency, even after finalisation of the adoption (s 9 Adoption Placement Act).
- Adoptive child: whether an adoption is in the child's best interests has to be thoroughly evaluated (s 1741 [1] CC). An assessment of the individual needs and wishes of the child, as well as their health and developmental status, is seen as an indispensable professional standard (Bovenschen et al, 2017a). The views and interests of the child have to be taken into account according to the child's age.

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From the age of 14, the child has to give their own consent. In the adoption mediation process, the child has a right to receive support according to their individual needs (s 9 Adoption Placement Act). Adoption agencies usually offer counselling sessions and home visits, and they play a key role in making referrals, for example, to child guidance clinics, therapists and clinics, and in enabling the adopted child to access the adoption file when they turn 16 (s 9c [2] Adoption Placement Act). Supervision of the child's access to the adoption file is obligatory.

- Adoptive parents: for the adoptive parents, the process begins with the application for adoption (s 1752 CC). The home study represents an assessment of whether they are suited for adopting both a child in general and the particular child (s 7a [1]2 Adoption Placement Act). A recommendation with detailed criteria by the federal association of the regional youth welfare offices at the state level (*Landesjugendämter*) acts as a non-binding and widely followed guideline (Bundesarbeitsgemeinschaft Landesjugendämter, 2019). The process of preparing for the adoption is intensive and unanimously considered as the most important part of a successful adoption (Bovenschen et al, 2017b). By the time the applicants are approved as adopters, they may be matched to a child. After all have consented to initiating the adoption process or the parental consent is substituted, a period of adoptive care begins, which usually takes one year with newborns and infants, and even longer with older children (Bovenschen et al, 2017b: 56). During this time, a guardian is appointed to the child. The period includes regular counselling and home visits. If foster parents apply to adopt their foster child, this process may vary as the parents have already been assessed when they became foster parents. Thus, the home study is usually shorter compared to the regular adoption process. If the child has already lived with the family for a long time, there may be no period of adoptive care. If the requirements for the adoption of the child are met, the youth welfare office and/or the adoption agencies file a report to the family court (s 50 Social Code Book VIII), and may take part in the hearing (s 194 Act on Proceedings in Family Matters). The judgment of the family court brings the adoption into effect. Adoptive parents also have the right to counselling from the adoption services after the adoption (s 9 [2]2 Adoption Placement Act).

After all legal requirements are fulfilled, the family court acts as the decision-making body. Adoption agencies prepare the case and issue a

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professional report (s 189 Act on Proceedings in Family Matters). The family court judgment is mainly a re-enactment since birth parents, adoptive parents and the child are heard. If no indication of conflict arises, no further assessment is usually initiated. Children have to be heard by the judge from the age of three or four. Exceptions are only permissible if the personal hearing by the judge poses a risk of harm to the child (Federal Constitutional Court, 1980; see also s 192 Act on Proceedings in Family Matters).

Conclusion

In Germany, practice rarely uses adoption as an option if a child stays in long-term foster care. Reasons seem to be multifaceted. Future research may help to understand if and how the role of adoption in permanency planning for children in out-of-home care who cannot return home may be strengthened in the future.

Regulations on adoption can be considered as conservative. Recent amendments in adoption law have mostly been enacted when forced by the Federal Constitutional Court (for example, concerning adoption by same-sex parents or discrimination of children in refused step-parent adoption cases). Hence, adoptions from care have not been touched by federal lawmakers, and neither the Federal Ministry of Justice nor the Ministry for Family Affairs have shown signs that changes are to be anticipated.

However, within its legislative scope, the Federal Ministry for Family Affairs has been pushing for reforms. The Adoption Service Act, in force since April 2021, includes provisions aiming at enhancing the quality of the adoption services. Among others, the cooperation of adoption agencies with other units is to be strengthened. Additionally, contact after adoption – and thereby the birth parents' rights to receive information about their child even after adoption – is encouraged. Counselling for both the members of the family of origin and the adoptive parents on the issue of contact after adoption is mandatory and must be documented. With the consent of both parties, counselling has to be repeated at appropriate intervals. Birth parents are to receive a right to information about the child after adoption. However, the adoptive parents still decide whether and which information is to be shared with the birth parents (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2019).

Nevertheless it seems questionable whether in cases of long-term out-of-home placements, cooperation between adoption services, on the one hand, and foster care services and general social services, on

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the other, will improve. Along with other professionals, we argue that adoptions from care, especially in long-term placements of children in foster families, should receive more attention in care planning processes. There is the possibility that organisational fragmentation – with general social services working with the family of origin before and after the placement, while foster care placement services work with the foster families (mostly without ever involving the adoption agencies in the care planning) – will be reduced over time. Current reform efforts promote a two-familial systemic approach if children are placed in care. In anticipation of a successful implementation of the proposed legislation, it is expected that adoptions from care will become a real option in the process of permanency planning for children.

Notes

[1] In addition, a small number of private agencies are approved for services regarding inter-country adoptions.

[2] Due to the fact that most children are comparably young when adopted, in many cases, the adoptive parents make decisions about contact after adoption.

[3] Further data reveal that the decline for both domestic and inter-country adoptions started in the early 1990s. For a discussion of possible reasons for this trend, see Bovenschen et al (2017a).

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